TECK PENG TRADING CO.

v.

SENG LEE TIMBER TRADING CO.

HIGH COURT MALAYA, KOTA BHARU
ABDUL MALEK AHMAD J
[CIVIL SUIT NO. 200 OF 1983]
15 JANUARY 1986

CONTRACT: *Joint venture agreement to extract timber from forest area - Breach - Claim and counterclaim.*

The plaintiffs asked for among other reliefs a declaration that they were entitled to 50% beneficial ownership of the timber extracted and produced from the forest areas known as Blocks 19 and 22, Kawasan Hutan Yayasan Kelantan Darulnaim (YAKIN) at Ulu Lebir, Jajahan Ulu Kelantan. All the other reliefs, except this were subsequently abandoned. By way of counterclaim the defendants prayed for judgment for RM28,938.25 being the sum owing to them from the plaintiffs as a result of their dealings on this project together with interest and costs.

The managing partner of the plaintiff firm (PW1) gave evidence of the entering into of the joint venture agreement with LYK of the defendant firm. He further stated that LYK had logged the two forests but had not sold the logs to PW1 as orally agreed nor accounted to him the proceeds of the sale. Another witness PW2, too gave evidence to support this story. Under cross-examination PW1 admitted he owed the defendant RM9,509.25 but stated it was in relation to a different forest area. Evidence was also given by another witness PW3 of the quantum of timber extracted by LYK. The price details of the timber was also led in evidence. For the defendants the only witness was an accountant who gave evidence on the interpretation of the relevant accounts. He however admitted he was neither an expert in accounting nor had personal knowledge of the detailed transaction.

Held:

[1] On an evaluation of the evidence of all the witnesses it was clear that there was a joint venture agreement between the plaintiffs and the defendants. LYK in choosing not to give evidence indicated that he did not dispute this fact. Accordingly the plaintiffs would be granted a declaration that they are entitled to 50% beneficial ownership of the timber extracted and produced from the two forest areas.

[2] Although the defendants had counterclaimed RM28,938.25 the amount actually due was RM9,509.25.

[Plaintiffs awarded RM433,635.72 with costs to be taxed. Defendants awarded RM9,509.25 with costs to be taxed.]

For the plaintiffs - Foo Say Ghee; M/s. Foo Say Ghee & Co.
For the defendants - C. Jegathesan; M/s. C. Jegathesan

JUDGMENT

Abdul Malek Ahmad J:

The plaintiffs are asking for:

(a) a declaration that they are entitled to 50% beneficial ownership of the timber extracted and produced from the forest areas known as Blocks 19 and 22, Kawasan Hutan Yayasan Kelantan Darulnaim (YAKIN) at Ulu Lebir, Jajahan Ulu Kelantan ("the two forest areas");

(b) an order for specific performance requiring the defendants to comply with the terms of the joint venture between the plaintiffs and the defendants and in particular to effect payment of all the proceeds realised form the sale by the defendants of all the timber extracted and produced from the two forest areas;

(c) an injunction to restrain the defendants whether by themselves or by their servants or agents or any of them or otherwise from dealing with the right to work, fell, cut, log or extract timber from the two forest areas or from removing or selling the same or from subletting or assigning the two forest areas or in any way permitting any third party from working the same;

(d) the appointment of a receiver to effect the terms of the agreement entered with between the plaintiffs and defendants and to maintain an account of all income and expenditure incurred subsequent to the filing of the suit;

(e) an order for accounts to be taken and other consequential relief as the Court may deem fit;

(f) alternatively an order that the defendants do pay the plaintiffs special damages in the sum of RM307,777.40 and general damages to be assessed for breach of contract, and such further or other relief, interest and costs.

By way of counterclaim, the defendants are praying for judgment of RM28,938.25 being the sum owing to them from the plaintiffs as a result of their dealings on this project together with interest and costs.

The managing partner of the plaintiff firm (PW1) gave evidence that he had known Liew Yeng Kong ("LYK") of the defendant firm since mid-1982 as both of them were engaged in buying and selling logs and had business dealings. As regards the two forest areas, they had entered into a joint venture on a 50-50 basis after deducting all expenses. PW1 added that he had paid a total of RM307,777.40 towards acquiring both the lots from PW2 and other initial expenditure. There was no written agreement and LYK was to form the company as orally agreed, do the logging and sell the logs to PW1. However despite LYK having logged the two forest areas, he did not sell the logs to PW1 nor account to him the proceeds of the sale despite their joint venture agreement. PW1 also told the Court that the counterclaim by the defendants was on an account for a separate business dealing. He also said that he had approached LYK on the matter but he was very aggressive and threatened PW1 with violence.

The managing partner of Syarikat Timber Serimba (PW2) testified that his company was given the licence to log the two forest areas and the extraction was done by the defendants. He was not aware who paid for the two forest areas but he got the money from the defendants although they came from another source. He added that PW1 was introduced to him by LYK as the latter's partner for the two forest areas. In November 1982 PW1 had approached him to mediate in dispute between PW1 and LYK and he had accordingly written a letter (P1) to

LYK to settle the matter out of Court. PW2 added that he then accompanied PW1 to see LYK in Seremban as there was no response to P1 but that meeting ended in a heated argument in Chinese between PW1 and LYK and no settlement was reached. PW2 then wrote to the Pegawai Hutan *vide* P2 authorising PW1 to deal direct with the forest authorities and to the State Forest Officer *vide* P3 stating that no extraction was to be done on the two forest areas until settlement was reached. Despite P3, LYK had completed work on both the two forest areas.

The plaintiffs then closed their case and Counsel for the defendants applied for an adjournment, which was not objected to, to call the recording officer of the Forest Tracking Station. At the subsequent hearing, Counsel for the plaintiffs told the Court that Counsel for the defendants wished to further cross-examine PW1 and that he had no objections. As the plaintiffs also wished to call another two witnesses for assessment purposes and since Counsel for the defendants had no objections to this, I allowed the plaintiffs to reopen their case.

When he was recalled, PW1 explained how he arrived at the amount he claimed. He admitted he owed the defendant RM9,509.25 on the account for Block 5 which is detailed in the trading account ledgers P4A and B but in this suit, he was suing for Blocks 19 and 22.

The Forester of the Gua Musang Forest Department (PW3) gave evidence that he was attached to the Lakloh Checking Station since 1981 and knew of the extraction of timber from the two forest areas. He did not know the name of the person working on them but knew that LYK was the person responsible for bringing out the timber from the two forest areas. From the records, he said 6,374,93 metric tons had been extracted from Block 19 and 7,646.47 metric tons from Block 22.

He went on to say that LYK finished logging the two forest areas in mid-1984. He added that all timber had to be checked and royalty imposed according to the variety but could not give the breakdown of each type. He concluded that what he told the Court was the same as in the records which he had sight of and which had since been sent to his headquarters.

The next witness (PW4), a timber merchant with 20 years' experience in timber logging and sawmilling, gave price details of the different varieties of timber in 1983 and 1984. He added that in working an area the logger had to spend money on making roads, royalties, premiums, kongsis, boundary lines, etc. and he would pay the logger RM80 per ton to extract timber. He said that having considered all factors, the average price per ton for the two forest areas would be RM200. Under cross-examination, he admitted that he had never been to the two forest areas.

After PW4 had completed his testimony, learned Counsel for the plaintiffs applied for an adjournment to subpoena someone from the Timber Board to give the 1983/84 price list of timber and someone from the Forestry Department to produce the records of actual tonnage for the relevant period as regards the two forest areas. He said he did so on the grounds that the Counsel for the defendants had objected to the so-called expertise and knowledge of PW4 and PW3 respectively on these points. I allowed his request in the circumstances.

At the subsequent hearing, Counsel for the plaintiffs told the Court that after going through the ledger books, the plaintiffs were no longer claiming special damages of RM307,777.40 and that prayers (b), (c), (d), (e) and (f) of the statement of claim were being abandoned. This meant that the only prayer left was prayer (a) where the plaintiffs were seeking a

declaration that they were entitled to 50% beneficial ownership of the tiber extracted and produced from the two forest areas. I can only presume that this was because on p. 49 of P4A there is an entry of "Block 19 and 22" written in different coloured ink to indicate that RM102,777.40 had been accounted for. Incidentally this is the only entry in P4A and B that made reference to the two forest areas.

The Enforcement Officer of the Statement Forest Department, Kota Bharu (PW5) told the Court that from the records, timber production for 1983 and 1984 for Block 19 was 3,921.30 and for Block 22 5,401.42 imperial or forest tons. Royalties for the same period was RM44,720.19 for Block 19 and RM61,499.18 for Block 22. She was not able to give the breakdown of the different species of timber found.

The Merinyu Kawalan Mutu Kanan of the Lembaga Perindustrian Kayu Malaysia in Kota Bharu (PW6) produce the monthly reports of the list of timber prices of the popular species of timber traded in Kelantan for 1983 and 1984 (P6).

For the defendants, the only witness was DW1 who testified that he was an accountant with no paper qualifications but had eight years' experience in accounting. He said he knew both parties to the suit and had prepared accounts for both. He then proceeded to give his interpretation of P4A and B although he admitted that he did not prepare them. Under cross-examination, he admitted that he was not an expert at accounting and in this case, he had no personal knowledge of the detailed transactions. He further agreed that the best person to interpret P4A and B would be LYK or his clerk.

Having seen and heard all the witnesses, in particular PW1 and PW2, and considered P1, P2, and P3, I was satisfied that there had in fact been a joint venture agreement between the plaintiffs and the defendants to log the two forest areas. LYK chose not to give evidence. I was of the view that by this election, the defendants did not actually dispute the fact that there was a joint venture agreement between the parties but only disputed the accounts. The witness for the defendants only came to Court to testify as to how he interpreted the accounts in P4A and B and I agreed with Counsel for the plaintiffs that anyone else could have done so without the benefit of his testimony. As regards PW3, PW4, PW5 and PW6, I was more inclined to accept the evidence of PW5 as regards the forest tonnage of the two forest areas for 1983 and 1984, as compared to PW3 who no longer had the records the had sight of, as she had given evidence based on the actual records kept by her department and had been authorised to testify based on P5. As to the list of timber prices for 1983 and 1984, I depended on PW6's testimony as he quoted the official figures of the Malaysian Timber Industry Board while PW4 based his figures on his personal experience.

Having held that there was in fact a joint venture agreement between the parties, I accordingly granted the plaintiffs the declaration that they are entitled to 50% beneficial ownership of the timber extracted and produced from the two forest areas. With things as they are, no one seems to know what was the value of the beneficial ownership and it is unfortunate that his problem was thrown to the Court, so to speak, to sort out under the claim for further or other relief.

According to the Forest Department records as stated by PW5, the timber production for Block 19 in 1983 and 1984 was 3,921.30 forest tons and for Block 22 for the same period 5,401.42 forest tons. The total therefore came to 9,322.72 forest tons. Form P6 produced by PW6 and the evidence of PW4, it is noted that the timber price per forest ton for the different species range from RM110 to RM340. Although Counsel for the plaintiffs submitted that the lump sum figure as average for the different specifies should be RM300 per forest ton, my

view was that PW4 gave the more realistic figure of RM200 per forest ton considering the price range of the different species and PW4's experience. Going on the average of P6 it should be RM203 per forest ton. This brings the figure to RM1,892,512.10. Royalties paid were RM44,720.19 and RM61,499.18 totalling RM106,219.37. PW4 also stated that the logger should be paid RM80 per forest ton for working the area and based on the total production of 9,322.72 forest tons this came to RM745,817.60.

Counsel for the plaintiffs also agreed that deductions should be made for the construction of roads, boundaries and the kongsis and for administrative costs. Since there was no evidence forthcoming on the expenditure for all these, I made an assessment of RM50,000 for the roads, RM10,000 for the kongsis and RM20,000 for the boundaries. In view of the terrain and the size of the area, I felt this was a fair assessment.

The expenditure for all these totalled RM932,036.97 and adding 10% for administrative costs as suggested by Counsel for the plaintiffs, it amounted to RM1,025,240.66. After deducting this amount from the total production income of RM1,892,512.10, the figure came to RM867,271.44.

In the circumstances, I now order that the defendants do pay to the plaintiffs half of RM867,271.44 which comes to RM433,635.72 with costs to be taxed. The defendants had counterclaimed for RM28,938.25 but from the accounts in P4A and B, I find that the amount due is actually RM9,509.25 on the Block 5 account and accordingly give judgment for the defendants for this amount with interest as prayed and costs also to be taxed.

Also found at [1988] 2 CLJ 248